

QUESTIONS TO THE PANEL

- Q. The Endangered Species Act is rather narrow about defining this problem. There are quite a few other programs that can be applied. Many of the federal land agencies have natural area programs. There are also a number of wildlife programs that can be brought to bear on the question of peripheral species and their distribution. We have the same problem with plant distribution, so I'm not sure the endangered species program is the right place for that kind of program, depending, of course, on what happens to the whole range. There are a lot of other programs that could help there.
- A. That particular problem is one of the things we are trying to address with our sensitive species category in our total endangered species program. We can take species like this and put them on our sensitive species list and then apply land management practices or management practices in a special way. There won't be the legal requirements, but we would treat them for land management purposes the same way we would treat a legally listed species. (McIlwain)
- Q. I have a corollary to this I need to address. I don't think it's been addressed to the extent that I need to understand it. Having worked for a private consulting firm, I've often been caught between two grist mills of state species lists and also federal species lists. Specifically, I'd like to know what your plans are for the future. I don't think I understand how you're going to correlate and work out these issues with the states. For example, the Hamper Project is not administered by the state. It's a national environment research park. What if we have a species there that is peripheral and we want to protect it, but the State of Washington doesn't. The population is found in Washington and parts of Oregon, Idaho, and Utah, but in most areas it doesn't warrant or merit consideration as a threatened species. How are you going to handle this conflict with the states? Will you be able to support it?
- A. Well, as a matter of fact, I don't see any conflict with the states at all in a situation like this. If a given state has its own endangered species legislation, and if a particular species, be it a peripheral species or whatever, is in trouble in that state, I see nothing wrong with that state listing that species under its legislation as an endangered species and protecting it accordingly. (McIlwain)
- Q. By a conflict, I mean to be able to fund them and support them financially. Most of the states don't have an adequate threatened and endangered species program, especially from the standpoint of funding resources. You have infinite amounts compared to what most of them do. Will you be able to support them on the basis of those peripheral populations?
- A. We have two separate funding resources in the endangered species program. One is the Section 15 monies, which our general appropriation authorizes, and the other is the Section 6 money, which is dedicated specifically to a grant and aid program through cooperative programs with the states. We have not, as a matter of fact, been able to obligate that money as quickly as we would like to—simply because there has not been enough demand in the states to really get with the program. I don't see any difficulty in funding through a matching 66 percent federal share-33 percent state share for state activities. I don't think we're going to run out of money any time sooner. (Spinks)
- Q. Wouldn't those matching funds work only for species that are listed as endangered species under the federal act?
- A. No, if they're considering it for listing under the state act. They would also be eligible for funding. (Spinks)
- Q. I've enjoyed very much your program, but you have not mentioned the aquatic forms. Now you take the fisheries on the North Atlantic, the whaling. They're vital problems with which we must deal. It seems to me that not only will we have to be financed, but it may even be we'll have to use a little military strength to restrain some of these people who say they have a right to hunt a particular species, the whale and so on. That is a major problem as I see it in connection with the immediate approach in dealing with these species.
- A. Your point is well taken. I'm glad the National Marine Fisheries Service is in this act with us. There is basically a division of responsibility in the act between the Departments of Commerce and the Interior, and the oceanic species are under the protection and administrative authority of the National Marine Fisheries Service. Certainly we do not in any way want to diminish the value of those species, as you point out, but that is again the prerogative of the National Marine Fisheries Service; and, as Mr. Vernimen mentioned, the Bureau of Land Management under the OCS leasing program does become involved with the National Marine Fisheries Service in the consultation process, like considering such species as the bow-head whale in Alaska, for instance. (Spinks)
- Q. I have a comment on a previous question. The State of Washington is being funded now by endangered species dollars to come up with a list of the state's threatened and endangered species, so it is possible to do that. The state game department is involved in that.
- Q. My question to you managers is from the point of view of private industry. I'm a representative of Utah Power and Light Company, and I'm not a biologist. I've learned a lot here in the last couple of days about biology. Obviously, the vital question to us is this. We realize that recent amendments to the act have created a lot of work for you guys to do. Are we going to have to wait for you to get all this work done before we can build any new plants, or will we have to provide some of the funding to get some work done on a specific basis by ourselves?
- A. No, you do not, as a matter of fact, have to wait until there are new Section 7 regulations promulgated, which could take some time. We are proceeding with the consultation process under the existing Section 7 regulations which Jerry McIlwain alluded to as having been published in January 1978. The

world is not going to stop until we have the new regulations. (Spinks)

Q. I want to ask a question concerning the program of the Forest Service people and the BLM in terms of the protective habitat, just to clarify what I'm concerned with. For a number of years I cooperated with some of the folks from California who were trying to preserve some sand dunes in southeastern California, southern Nevada, and perhaps other areas from dune buggies and off-road vehicles that just traversed the area without any concern for the animals or the plants that were there. Now I haven't heard from Bob Stebbins or Dave Wake or some of those folks for a few years as to whether or not they have succeeded in convincing the Bureau of Land Management that some steps should be taken to protect those sand dunes habitats before the sand adapted and a number of other forms are exclusively restricted to those areas. What has been done and what is the program of the Bureau now to protect habitat from these kinds of degradations?

A. We do now have the three species in California that are officially listed. I believe two of them are in the sand dunes area. For one of them, specifically, the Eureka Sand Dune Grass, the Bureau of Land Management has tried to close this area. We've received some criticism as to how effective the closure of these lands has been. Others say it's been very effective. But, to go back to the other part of my answer, our planning process is to go through our inventories and identify critical habitats, sensitive species, proposed species with their habitats, and, through the planning process, tie these areas in with other proposed actions, one of which could be off-road vehicle use. Then, in the final recommendations through our planning process, the decision is made then as to what action will be taken in regards to that area—whether it be closure, restrictions from other uses, grazing, off-road vehicles, or other means to protect certain species. This is the process. Now the actual implications of success to this process we've yet to see in many cases, but we are making a sincere attempt. (Walker)

I think the other area we can talk about, speaking of California, is the Desert Tortoise area, on which Dr. Kristine Berry and a team of other people have been working. We have fenced out most of that area. We have also posted signs, although I have heard recently that 400 signs have disappeared. We also have off-road vehicle regulations we are looking at, where we would close it to such vehicles. Incidentally, one of the beetles proposed does occur right in the middle of an off-road vehicle area in Nevada.

We also have authority for emergency closures if we want to use it. (Verninen)

Q. What I'm trying to suggest is that if the Bureau of Land Management or private industries, do not protect the desert habitat, we stand to lose a lot of this very valuable material.

Q. I'd like to bring up the controversy of reintroduction in an area of historic range, but not now present. We ran into it with the Colorado squawfish. I was wondering if the land management people would

comment about taking an endangered species into a recovery plan, trying to get it off the list more or less by reintroduction into the historic range. Do you run into the resistance of a local forester or a local district manager saying, "If I have to worry about that I won't be able to go into the campground"?

A. That's a very difficult and subjective question, one which is extremely hard to formulate a policy on because you have to adjust to the situation on something like that. Certainly we're not going to reintroduce grizzlies to the plains where they once occurred around the Denver area. That's completely unreasonable. On the other hand, in the process of identifying the essential habitats or the legally designated critical habitats on the public lands, we found a lot of these that are historical into which we can logically expand species. Somewhere in the middle between the unreasonable and the feasible is the line, and how you define that line is very difficult. It's going to be a subjective decision. (McIlwain)

I'd like to cite an example. In Arizona they want to reintroduce the woundingin into historical habitat. At the same time, this habitat is the number one geothermal exploration area in Arizona. This is the type of administrative problem we get into, and I am to the point now where I tend to agree with a state director who says, "No, not until further studies are completed." The problem is "Can we under the act say no?" So, right now that opinion is in the solicitor's office. These are the kinds of things you run into. You've got to use some judgement. We have an area that's being managed for some specific resource and then all of a sudden we throw something else in there that is going to change it. We're going to have to weigh that very heavily before we reintroduce it. (Verninen)

I'd like to make one more comment before we beat this question to death. Is this a situation where it is really necessary for the survival of the species, or is it something we would like to see for the promulgation of the species? To me this is the big question, and it gets down to whether we really need to or just want to. I think reintroduction of a species should be considered as a last resort in the perpetuation of the species. We have to consider the problems we run into with reintroduction. Are we creating more problems than we are solving?

Q. In Utah we have watched the systematic destruction of the Lyndyl Sand Dune area, the Coral Pink Sand Dune area, and the Hurricane Sand Dune area, all of these under major control of the Bureau of Land Management. I am about to describe a new species of sunflower from the Lyndyl Sand Dunes, known in Utah by the misnomer, Little Sahara. It is not. It cannot be. It is systematically being destroyed. We're not talking about reintroducing something, but we're talking about protecting something the Lyndyl Sand Dunes have, among other unique species which Professor Stutz mentioned earlier today. The Coral Pink Dunes have still others. The ones at Hurricane are unexplored. We don't know what's on them. We may never be able to find out because of off-road vehicle use. What is the potential then, for a turnabout for at least a part of these areas?

- A. It just so happens that when I was in the Richfield district, as well as being a wildlife biologist I was a recreation specialist and I did have something to do with Little Sahara as you call it. I am not too familiar with the Hurricane area you talk about. Now the southern part of the Coral Pink Sand Dunes—correct me if I'm wrong—are managed by the state as a state park. My question is "Have you contacted the state office here and informed the Bureau of Land Management that you have found those plants?" (Vernimen)
- Q. How does the BLM treat endangered or threatened species on subsurface land? By that we mean private ownership of the surface and someone else owns the minerals, oil, gas, coal, etc.
- A. First of all, the identification of the critical habitat and the inventories (unless we have an action taking place right at that time) is the responsibility of the Fish and Wildlife Service on the private lands. If you take the case of the Red Cockaded Woodpecker in Alabama, where the BLM has some subsurface coal, the BLM is doing the inventories. The BLM is also doing the inventories on the Eastern Cougar. We are in the process of contracting an individual to do the inventories on that. If we would let a lease go, we are initiating an action. We are responsible to see that that species is protected.
- Q. Is that also the case for critical habitat on state land for endangered plants and endangered plants on private lands?
- A. Are you saying designation of a critical habitat or protection of a critical habitat? (Vernimen)
- Q. Identifying of an endangered plant on private surface land but federal subsurface. Wouldn't the private landowner have the discretion of saving that plant?
- A. Well, no. If we didn't sell the coal in there, it wouldn't be mined. (Vernimen)
- Q. So you could deny the lease of such materials?
- A. That's correct. (Vernimen)
- A. May I address a couple of things that you said. Number one, plants are not protected from being taken under the act. If the private landowner has a bunch of furbish louseworts or whatever and the man wants to go out there and chop them all down with a hoe, that's legal. The second point is that, in terms of having something protected by virtue of having critical habitat determined for it, it is protected from a federal action under Section 7, whether or not there is any critical habitat there. There is a basic question of jeopardy. Among other things in Section 7, besides almost an affirmative action clause for federal agencies to do some good things for listed species, there is the no section that says they shall insure their actions do not jeopardize the continued existence of a species. So, with or without critical habitat designation, there would still be this responsibility to not jeopardize the species. (Spinks)
- Q. You said yesterday, when you were enumerating the amendments to the act, that the application for critical habitat would be withdrawn.
- A. Our understanding at this point in time is that the outstanding proposals for critical habitat designation will be withdrawn and repropoed to bring them in compliance with the 1978 amendments. (Spinks)
- Q. In response to that, I'd like to ask Mr. McIlwain what kind of protection will be given to the critical habitats of the grizzly bear, mainly because there is such a controversy over how much should be given them?
- A. As far as I'm concerned, critical habitat on forest service lands doesn't really mean very much because we're protecting that critter or the habitat of that listed species as a requirement of the law regardless of whether it is legally designated as critical habitat or not. We have management programs established now to protect grizzly bear habitat and we're establishing others as time goes on. It really makes little difference whether critical habitat is legally designated or not for the time being. (McIlwain)
- Q. I'd like a little clarification with regard to the conflict between the Endangered Species Act and mining development. There seems to be a rather nebulous area.
- A. I know just what you're talking about. I have several memos in my office about people asking just where does the 1872 Mining Law and the Endangered Species Act fit in. As you know, they are both non-discretionary, and it's kind of like two penalties on a football field. They more or less nullify one another. I'm not at liberty to comment right now. The solicitor is coming out with an opinion on the 1872 Mining Law and the Endangered Species Act, and I don't know yet what he is going to say. Right now they can go ahead with exploration and mining development for hardrock minerals, gold, silver, and so forth. There is nothing that the Endangered Species Act can do to stop them. Nothing. (Vernimen)
- My only comment is that we may be finding out what happens in this regard before too long because we have two situations now on Forest Service land, two similar conflicts, one in Arizona and one in California, conflicts between the Mining Act of 1872 and the Endangered Species Act in relation to an application for mining within a bald eagle nesting territory. Either or both of those may get to court before too long. (McIlwain)
- Q. Would the Forest Service get a different opinion if you went through a different group as it were?
- A. Well, we go through a different solicitor. We go through the USDA Office of the General Council, which is the same as a solicitor. (McIlwain)
- Q. Are you seeking an opinion also?
- A. No, we're not. (McIlwain)
- The bottom line here on the opinion of a solicitor or the Office of General Council from the Department of Agriculture, as in the case of the U.S. Forest Service, is an internal guidance mechanism for that department or agency. The real bottom line is written through the development of case law, and, until there is sufficient litigation involving such conflicts as mining and the Endangered Species Act, there will not be a hard and fast answer to that very good question. (Spinks)
- Q. Your statement puzzles me a little bit regarding conflict between the Endangered Species Act and the mining law with respect to bald eagles, especially the protection of bald eagles is so stringent with regards to nesting areas, etc. Isn't the Forest Service required to adhere to that?

A. Yes, we're required to adhere to that, but there is a question as to when you are really harrasing a bird. In the particular conflicts that I'm talking about, we have established a territory for a bald eagle nesting pair, and the mining people want to build a road through that territory and mine outside of it. We've told them no. We're set up to be sued any way we go. If we give a permit to the mining operation, we're going to be sued by the environmentalists under the bald eagle act or the Endangered Species Act or others. On the other hand, if we say no, we'll be sued by the mining interests. In this particular

case we decided to remain on the side of the environmentalists. (McIlwain)

Q. The Fish and Wildlife Service just recently issued a proposal for critical habitat for the squawfish. Will you finalize that rule making, or are you still working that thing over? What is that status.

A. Like other proposed rule makings for critical habitat determination, that will have to be repropoed to comply with the 1978 act amendments.

Q. It will be repropoed then at some future date?

A. Yes it will. (Spinks)